

tion status) had not been taken into account as he should have done under paragraph 1(2) thereof. The addition of \$5,000 to \$6,000 per acre which the judge chose to value as its "building potential to its estimated value because it had become a housing estate as a direct consequence of the acquisition is again in contravention of paragraph 3(e) of the same Schedule.

The many transactions shown in the plan referred to as Appendix B in the Valuation Officer's Report can but serve as a general guide to land values in that area. The range of prices is however wide. Having warned ourselves to bear in mind those statutory principles previously mentioned we do agree with the learned judge that the adjoining Lot 922 sold on August 14, 1974 for \$11,022 per acre would in the circumstances be the best price on which to base our valuation. We also agree that the evidence point to a steady rise in land values in the vicinity, though not perhaps as much as in the case of the two non-reservation lots considered by him. In addition, there is the added advantages of Lot 799 having two road frontages (Lot 922 has only one), of being adjacent to a school as well as being noticeably closer to the sea. Taking all these factors into account we are of the view that the sum of \$13,000 per acre would be reasonable compensation.

We would allow this appeal with costs and order that the amount awarded by the court below be reduced to \$13,000 per acre.

Appeal allowed.

Solicitors: *Suleiman, Nava & Raj.*

YONG NYEE FAN & SONS SDN. BHD. v. KIM GUAN & CO. SDN. BHD.

[F.C. (Chang Min Tat F.J., Syed Othman F.J. and Abdoolcader J.) October 23, 24 & November 15, 1978]
[Ipoh — Federal Court Civil Appeal No. 15 of 1977]

Trust — Property bought and registered in name of appellant company — Respondent company alleging that property held in trust for them — Person who bought property since died — Case for claimants of trust to be approached with suspicion — No evidence that purchaser constituted himself a trustee — Laches — Constructive trust not proved.

Practice and Procedure — Whether appeal court can differ from trial court — Inferences to be drawn from evidence.

In this case a house was bought by one Yong Nyee Fan (since deceased) and registered in the name of the appellant company. The respondents paid compensation to the tenants of the premises and thereafter occupied the premises. The deceased had demanded rent from the respondents for their occupation but they claimed that the payments made by them were for interest. There was no evidence that the deceased had constituted himself the trustee of the property for the respondents. The learned trial judge however held on the evidence that there was a constructive trust and he declared that the property was held by the appellants in trust for the respondents. The appellants appealed.

Held, allowing the appeal: (1) the authorities establish that though the case for the claimants of a trust against a dead man needs no corroboration, it must be approached with suspicion;

(2) in the absence of evidence in this case, the alleged trust could not be said to have been proved, even on a balance of probabilities.

Cases referred to:-

- A** (1) *Weld-Blundell v. Petra* [1928] All E.R. Rep. 564.
- (2) *Archbold v. Scully* 9 H.L. Cases 371.
- (3) *Lindsay Petroleum Co. v. Hurd* L.R. 5 P.C. 239.
- (4) *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218.
- (5) *Parkin v. Thorold* (1862) 16 Beav. 59, 66-67; 51 E.R. 698.
- B** (6) *In re Hodgson* (1886) 31 Ch. D. 177, C.A.
- (7) *In re Cummings decd.* [1972] 1 Ch. 62, C.A.
- (8) *In re Garnett* (1886) 31 Ch. D. 1, C.A.
- (9) *Thomas v. Times Book Co.* [1966] 1 W.L.R. 911.
- (10) *Re Postlethwaite* (1888) 60 L.T. 514 C.A.

HIGH COURT.

- C** *Chinn Swee Onn (Soo Wai San with him) for the plaintiff company.*

Chin Fook Yen for the defendant company.

Cur. Adv. Vult.

- D** **Hashim Yeop A. Sani J.:** The plaintiff company began as a partnership business dealing in textiles under the name and style of Kim Guan & Company with its registered office at No. 65, Hugh Low Street, Ipoh, the partners being Yap Fook Sen and Tan Phang Nam, i.e. PW1 and PW2 respectively. In early 1955, the company was converted into a limited company on incorporation under the name and style of Kim Guan & Company Sendirian Berhad and has since then been having its registered office at No. 26, Hugh Low Street, Ipoh. The first directors of the new company were PW1, PW2 and one Yong Nyee Fan (since deceased). What will shortly be unfolding is the story of these three business associates.

- F** In 1949 a social club for Chinese businessmen of the town of Ipoh was formed for social as well as for business purposes. There is evidence from PW1 and PW2 that they frequently met at the club during the early part of 1950s. PW1, PW2 and the said Yong Nyee Fan were obviously close business associates throughout the period of the 1950s. This must be so for it is in their evidence that both PW1, Yap Fook Sen and PW2, Tan Phang Nam had been associated with the said Yong Nyee Fan in another mining company called Yong Nyee Fan Mining Company which they formed in 1950.

- H** It would appear from the evidence of PW1 and PW2 that the incorporation of the plaintiff company was preceded by several informal meetings between these three persons. According to their version the said Yong Nyee Fan became interested in the textile business because he himself said that there was good prospect in that business due to the Korean war. This was said to be sometime in 1954. Although Yong Nyee Fan first showed interest around 1950 it was only in 1954 that something materialised from their meetings at the social club. It would also appear that another company of the said Yong Nyee Fan had also been formed by then and this was Yong Nyee Fan & Sons Company Limited, the defendant company, which is an investment company. PW1 said he discussed with PW2 who at first did not seem to be interested to have another partner in their textile busi-

ness but after a further discussion at the club the said Yong Nyee Fan told them that premises No. 26, Hugh Low Street, Ipoh, was being offered for sale at \$35,000 and that the shop would be a good site for the proposed company. It was then that the said Yong Nyee Fan told them that if the new company was formed he himself would bring out the \$35,000 to purchase the premises. Apparently PW2 had by then already accepted the idea of taking in a new partner. According to the evidence of PW1 and PW2 it was further agreed between them that PW1 and PW2 would be responsible for vacant possession of the premises (which in effect meant paying "tea money" to induce the tenant to vacate the premises) and all these monies were to be expended on behalf of the proposed company. The version of the plaintiff can best be expressed in the testimony of PW1 which was as follows:—

"There was a second discussion between 3 of us at the club. During the discussion Tan told us that the Chop was prepared to vacate the premises for \$30,000. After haggling we managed to bring it down \$19,000. Then Yong suggested that the deal could be completed as the figure was acceptable. Then Tan and I raised the amount of \$19,000 on behalf of the new company. Yong agreed to advance \$35,000 for the purchase of the premises. The 3 of us agreed that the two sums were advanced to the new company. The purchase of the shophouse was to be made on behalf of the new company. Tan and I advanced the \$19,000. After obtaining vacant possession we had the third discussion at the same club to form the new company. Yong suggested to convert Kim Guan & Co. into Kim Guan & Co., Ltd. The capital was \$500,000. The subscribed capital was \$299,000. Out of that I was to be allotted \$100,000. Tan \$100,000. Yong and his nominees \$99,000. This was so because Yong told Tan and I that \$1,000 was for registration fee if the subscribed capital was \$300,000. Yong told me he was court interpreter before. He was also C.C. in legal firm. The business of the new company to be attended by Tan and I. Yong was to be treasurer of the new company and responsible to appoint the secretary. All these were agreed to. Tan and I were responsible for vacant possession. Yong was responsible for purchase of the house. All these done on behalf of the new company to be formed."

So the plaintiff company was formed and it started business at the new premises on January 3, 1955. In February 1955, the said Yong Nyee Fan presented a bill which was in fact a prepared receipt for rental in respect of the premises. According to PW1 both PW2 and he objected to this receipt as it was understood that the premises "belonged to the company" and therefore there was no question of rental. According to PW1 this was also the first time that he came to know that the premises had in fact been bought in the name of Yong Nyee Fan & Sons Company Limited and not in the name of Yong Nyee Fan himself on behalf of the proposed company. Apparently according to PW1 he and PW2 decided to withdraw from the partnership as in his own words "Yong Nyee Fan did not keep his word." But after some discussion PW1 said Yong Nyee Fan agreed to transfer the premises to the company at \$37,000 being the amount made up of the purchase price (\$35,000) and other expenses which amounted to \$2,000. According to PW1 Yong Nyee Fan also agreed that in the interim period pending the transfer a sum of \$220 per month should be paid by the plaintiff company to the defendant company not as rental but as a sum reflecting the interest according to the bank rate at 6 per cent. According to PW1 it was also agreed then that the plaintiff company was to pay the assessment and quit

rent since ultimately title of the premises was to be transferred into the name of the plaintiff company. According to PW1 Yong Nyee Fan also said that since their business had just begun the plaintiff company needed funds more urgently for other purposes and as such there was no hurry in respect of the \$37,000 to transfer the premises into the name of the plaintiff company.

In July 1956, PW1 said he received a letter from the defendant company which in fact is a very formal letter terminating the tenancy of the plaintiff company as on August 31, 1956. The second part of that letter however stated that the defendant company was prepared to grant a new tenancy as from September 1, 1956, at a new rental of \$300 per month. PW1 said he was alarmed when he received this letter and saw Yong Nyee Fan straightaway but was told by the latter that the increase was due to the increase in the bank rate from 6 per cent to 8 per cent (which amount if calculated basing on \$37,000 would indeed come to the round figures of \$220 and \$300 per month respectively). PW1 said he was agreeable to the enhanced rate of interest and so was Tan, PW2. It was at this juncture that PW1 said he had discussions with PW2 on the transfer of the premises to the plaintiff company but found it "to be difficult" and decided again to end the partnership with Yong Nyee Fan. According to PW1 they conveyed this to Yong Nyee Fan but the latter assured them that they should not worry.

In the meantime, however, the said Yong Nyee Fan deteriorated in health. The last time Yong Nyee Fan attended the directors' meeting of the plaintiff company was on January 28, 1957 and on March 13, 1957 he was replaced by his son Yong Su Hian, DW3, as alternate director.

After his appointment as alternate director DW3 attended meetings of the directors of the plaintiff company on behalf of his father Yong Nyee Fan. However sometime between the directors' meeting held on January 28, 1957, (attended by Yong Nyee Fan) and the following directors' meeting held on February 5, 1957, (not attended by Yong Nyee Fan) something would seem to have transpired between Yong Nyee Fan and PW1 and PW2. According to PW1 it was at this time that Yong Nyee Fan threatened to resign as director because he was not paid \$600 per month as in the case of PW1 and PW2. But PW1 and PW2 were not agreeable to the plaintiff company paying Yong Nyee Fan the salary of \$600 per month because the actual day to day running of the business of the company was being done by PW1 and PW2; PW1 was in charge of purchases and sales and travelled widely throughout the country and PW2 was the manager and worked every day from 8.00 a.m. to 6.00 p.m. at the shop. They claimed that Yong Nyee Fan did nothing beyond preparing for the setting up of the company and furthermore his daughter Yong Toong Liew, DW1, was already receiving a salary from the company as Secretary. In addition Yong Nyee Fan was also the company's treasurer and receiving a salary. It was at this time according to PW1 that Yong Nyee Fan also told him that his company would now be prepared to transfer the premises to the plaintiff com-

pany at \$45,000 instead of \$37,000 to which they said they agreed. This price of \$45,000 appeared in the minutes of the meeting of the directors held on February 5, 1957. However from what can be gathered from the records the minutes at that date only stated that the directors present "realised that it would be advantageous to the company if the company buys over the shop." After a discussion at that meeting there was apparently unanimous agreement to purchase the premises for that sum. The latter part of the minutes on the subject dealt with the manner in which the sum was to be raised between PW1 and PW2. According to PW1 he did chase after Yong Nyee Fan for the title deed after that meeting for the purpose of the transfer of the premises into the name of the plaintiff company. But again Yong Nyee Fan told him not to worry as all were recorded in the minutes of the meetings of the directors. Soon thereafter Yong Nyee Fan left for China for medical treatment.

To continue with the story, in 1959 Yong Nyee Fan returned from China and soon after that according to PW1 he received a telephone call from Yong Nyee Fan who asked him to go to his house. Apparently Yong Nyee Fan was then already very ill and PW1 went to the house as requested. There Yong Nyee Fan told him that the delay in transferring the premises to the plaintiff company was actually because his feelings had been hurt by the company not allowing him to receive the salary of \$600 per month as in the case of PW1 and PW2. PW1 said he assured Yong Nyee Fan that the company would pay him the salary he wanted so much when he recovered from his illness. This he said was also agreed to by PW2. Unfortunately Yong Nyee Fan died in 1960 without recovering from his illness.

After Yong Nyee Fan's death DW3 took over where the late father had left. In respect of the plaintiff company the first action taken by DW3 was to demand for the increase in rental in 1961 from \$300 to \$700 per month on the ground that the value of the premises had increased to \$70,000. In his own words DW3 said that the defendant company was an investment company and he wanted reasonable returns. DW3 also admitted that he was prepared to transfer the premises to the plaintiff company then not at \$45,000 but at \$70,000 and it would not be profitable to collect only \$300 rental per month. However PW1 and PW2 disagreed with the proposed increase in rental but continued to pay \$300 per month. A notice to vacate was sent by the defendant company to the plaintiff company which resulted in an Extraordinary General Meeting by the Board of Directors of the plaintiff company held on October 8, 1961. This meeting will be dealt with later in this judgment. After the meeting things appeared to quieten down between the plaintiff company and the defendant company until 1967 when on February 3, 1967, the defendant company wrote a letter to the plaintiff company asking for a "fair rental" obviously under the newly legislated Control of Rent Act, 1966. The letter stated that the existing rental was "far too out of place with the investment value of the premises" and that in order to obtain a reasonable investment return the defendant company might be "forced to rebuild the

A premises." It was admitted there was a discussion subsequent to that between DW3 and PW1. On May 29, 1970, DW3 again instructed his solicitors to give a notice for development. This notice envisaged eviction under a provision in the Control of Rent Act, 1966 to effect development and the notice gave one year's grace for the plaintiff company to give vacant possession of the said premises. On January 5, 1973, the defendant company instituted action under section 18 of the Control of Rent Act, 1966 and the plaintiff company responded by lodging a caveat followed by the institution of the present suit. The plaintiffs' solicitors sent a letter to the defendant company setting out their version of their position with regard to the said premises.

C Let us first consider some documents in the Agreed Bundles A and B where statements pertaining to the relevant facts are recorded in writing.

First, the minutes of the meetings of the directors of the plaintiff company. The first meeting of the directors was held on February 25, 1955 at which meeting DW1 was appointed secretary although DW1 in her evidence said she could not remember whether she was actually present at that meeting. At this meeting it is clearly recorded that the first directors of the company were in fact PW1, PW2 and the said Yong Nyee Fan. The only reference made at this meeting to the premises in question is under the item "Registered Office" where it was confirmed that the registered office of the company would be at No. 26, Hugh Low Street, Ipoh." No reference was made to the premises in question in subsequent meetings until the meeting of the directors held on February 5, 1957. Apparently the subject came under discussion and the following appears in the minutes:

F "*Purchase of 26, Hugh Low Street, Ipoh, for \$45,000.*
Messrs. Yong Nyee Fan & Sons Limited, the owner of this premises decided to sell this premises for the sum of \$45,000. The directors realized that it will be advantages to the Company if the Company buys over this shop. After much discussion it was unanimously agreed to buy 26, Hugh Low Street, Ipoh, for the sum of \$45,000.

Grant of 26, Hugh Low Street, Ipoh.

G The directors gave power to the Managing Director to hand over the grant of the above premises to the Chung Khiaw Bank, Limited, Ipoh as surety for the loan of \$30,000. Should the sum of \$30,000 be insufficient to make up for the purchase price of this premises, Mr. Tan Phang Nam and Mr. Yap Fook Sen would be empowered to get a further loan of \$15,000 from the Chung Khiaw Bank, Limited Ipoh."

H The meeting following held on March 11, 1957, also discussed the said premises under Matters Arising and the following appears under that item:

"(a) *Purchase of 26, Hugh Low Street, Ipoh.*

The Directors decided to have the transfer of this property put through when Messrs. Yong Nyee Fan & Sons Limited decided to do so."

I At a subsequent meeting held on July 28, 1957, the said premises came under discussion again under Matters Arising and the following appears under item (a):

"(a) *Purchase of 26, Hugh Low Street, Ipoh.*

This item has not been carried out as the owner of this property has not decided to sell it yet. Meantime this item is to be left in abeyance for the time being."

Secondly, the minutes of the Extraordinary General Meeting of the directors of the plaintiff company held

on October 8, 1961, attended by the directors including PW1, PW2 and DW3 made reference to the matter under discussion simply as follows:

"Mr. Yong Su Hian states on behalf of Messrs. Yong Nyee Fan & Sons Ltd., that this notice should not have served on this company but for the misunderstanding between Kim Guan & Co., Ltd., and the members of his family, and suggests that if the misunderstanding could be cleared up, he would like to withdraw the said notice with the consent of the Meeting.

After long-drawn discussion it is unanimously decided that the matter be dropped as the notice is not well conceived and hastily drawn up and that some way be sought out for the misunderstanding."

Thirdly, all the receipts issued by the defendant company to the plaintiff company for what PW1 and PW2 referred to as "interests" for the sum expended by Yong Nyee Fan but what the defendant company maintained as rental in respect of the said premises appeared clearly as receipts for rental. A sum per month had been diligently paid by the plaintiff company to the defendant company since February 1955 right up to April 1973. The amount began as \$220 per month up to August 1956 and the amount was increased to \$300 per month until the end. The increase from \$220 per month to \$300 per month was obviously the result of the letter which contained a threat to terminate the tenancy unless the rental was increased. This event has already been referred to earlier. Related to these payments is also a number of other documents in the Agreed Bundles during the relevant period where these payments were referred to by the plaintiff company expressly as "rents" although some of these letters also contain references to payment of assessments together with the rentals in respect of the said premises.

Fourthly, it would appear that PW1 himself was the author of some of these letters among which was a letter written in Chinese referring to the amount as "rentals." Under this same category is also a document in the form of a letter from the tenant of the premises in question at time of purchase and before occupation by the plaintiff company to the effect that he (the tenant) "surrendered" the premises to the defendant company and that the defendant company was "at liberty to let it to Kim Guan Company Ipoh."

Fifthly, the defendant company gave in all three notices to vacate to the plaintiff company. The first at the same time asked for the increase of rental referred to earlier. The second was one year's notice to vacate which notice resulted in the requisition of the Extraordinary General Meeting held on October 8, 1961. The third was the letter from the solicitors of the defendant company asking for the fair rent but since this letter was not replied by the plaintiff company another letter was sent to the plaintiff company about ten days later threatening eviction. The final one was a notice from the new solicitors of the defendant company giving the plaintiff company one year's notice with a view to take over the premises for development.

Sixthly, the annual returns of Yong Nyee Fan & Sons Co., Ltd. disclose that it started very much as a family company of the late Yong Nyee Fan. According to DW3 his father was the Chairman and his mother the alternate Chairman in the early years since

A the incorporation of the company in 1952. The other shareholders in the early period were also close members of the family including DW1 and DW3. It is an investment company.

Finally, the statement of the property accounts of the defendant company shows that —

- (a) against the date October 28, 1953, a sum of \$35,000 was expended for the purchase of No. 26, Hugh Low Street (the said premises);
- (b) against the date November 4, 1953, another sum of \$700 is shown to have been expended as commission in respect of the purchase;
- (c) against the date November 5, 1953, a further sum of \$200 shown expended as solicitors' fees in respect of the same transaction; and finally
- (d) against the date November 11, 1953, a sum of \$544.40 is shown to have been expended for stamp and legal fees; all in all making a total of \$36,444.40 which sum can be rounded up to \$37,000.

D In normal cases it would have been easier to go through these documents either as basis or corroboration as to which of the versions of what actually happened during the material period is the more probable one. But apparently it is not the case here and I say this for the following reasons. One thing is clear so far and that is this — what is contained in some of the documentary evidence is not quite the same as what is said by the witnesses. Because their versions are diametrically opposed there is then the question of how to get a clear picture of what actually happened. On going through the oral evidence and the documentary evidence in this case there is therefore in my view a need (for other reasons as well which will be shown later) to reconcile their oral evidence with the documentary evidence. The directors of the plaintiff company during the material period including PW1 and PW2 did not understand English and although the proceedings of the directors' meetings held must therefore have been in the Hakka language the minutes were recorded in English. Minutes of these meetings were read again in English and translated in Hakka to the directors at the subsequent meetings. It would appear from the evidence of DW1 and DW3 that only one director apart from DW3 himself (Yong Su Hian) understood English and this director was one Yau Yit Ping. According to DW1 (Yong Toong Liew) she was the secretary of the various meetings during the material period. She was the secretary to all the directors' meetings (except for 2 months when she went on leave in the latter part of 1957) and the last meeting when she served as secretary was held on February 14, 1959. During that period she herself said she drew up the minutes but the minutes were explained and translated to the other directors by the said Yau Yit Ping. Yau Yit Ping however was not called to give evidence to this effect. From all these one thing emerges and that is, one will not get a clear and true picture of what actually happened unless a finding is made first on the credibility of each of the witnesses concerned. In arriving at a finding on credibility the court must also bear in mind the business custom and practice obtaining in the community to which the

witnesses belong. These to my mind are the unique features of this case. For these reasons I propose now to set out briefly the standing of each of the witnesses who gave evidence for the plaintiff and the defendant:—

(1) PW1 — He is a sixty-one year old cloth merchant and from the evidence it is disclosed that he has been a cloth merchant throughout his business life except for his participation in the mining company Yong Nyee Fan in 1950. He was undoubtedly a close business associate of the said Yong Nyee Fan. The plaintiff company started off with PW1, the said Yong Nyee Fan and PW2 as the first directors in 1955. The Yong family left the plaintiff company and sold out their shares in that company in 1961 leaving only one Yong Kee Foon (an uncle of DW3) who however also left the plaintiff company in 1964. The family of PW2 left the plaintiff company in 1962. At present the plaintiff company is owned by PW1 and his family and PW1 is the managing director. *Prima facie* PW1 must therefore be regarded as a witness who has an interest to advance in the case.

(2) PW2 — This seventy-two year old cloth merchant was in his own words a close business associate of PW1 whom he had known for more than forty years. In 1949 PW2 together with PW1 started a cloth business at 65, Hugh Low Street, Ipoh. This was the old company which was converted into the new company of Kim Guan & Company Sdn. Berhad, the plaintiff company. PW2 also had interests in the mining company of Yong Nyee Fan and therefore must have been a close business associate of Yong Nyee Fan too. Apart from the alleged joint contribution of the sum of \$19,000 for the purpose of acquiring vacant possession of premises No. 26, Hugh Low Street, Ipoh, together with PW1, PW2 has now no further interest in the plaintiff company since he and his family left the company in 1962. This witness in his testimony corroborates substantially the testimony of PW1 in matters pertaining to the alleged trust and as to the events that followed. One aspect of PW2's evidence material for consideration is that which is diametrically opposed to the evidence of DW1 (Yoong Toong Liew) the secretary of the plaintiff company during the relevant period in that according to PW2 not only were the minutes of the directors' meetings of the plaintiff company drawn up by DW1 but she also usually interpreted the contents to the members of the board who could not (except for one) speak English. Another aspect of PW2's testimony which he maintained strenuously was that the plaintiff company had agreed to be responsible for payment of not only the assessment but also the quit rent of the said premises. He could not however explain why in the statement of account of the defendant company only the payment of assessment was included. He said in his cross-examination:

"Being company's property the company paid the assessment. Yong collected both the assessment and quit rent. (Witness shown D1.) I agree record only payment of assessment. It must be entered in another form."

PW2 insisted that it must have been recorded elsewhere. At the end of his cross-examination he said:

"I am telling what I know. I am not interested in the company anymore. . . . I have no interest whatever in the case."

(3) DW1 — She is a forty-eight year old staff nurse attached to the University Hospital, Kuala Lumpur. She is one of the surviving daughters of Yong Nyee Fan. Her shares in both the plaintiff company and the defendant company were paid for by the late father Yong Nyee Fan. Her account of how the defendant company came to purchase the said premises was that one Madam Leong enquired whether the company would buy the property which was offered for sale. Whereupon DW1 said she told Madam Leong she would discuss the matter with her mother. Apparently after the discussion they decided it was a good proposition to purchase the premises as it was on the main street. However she said they decided "out of respect" to the father to discuss this with Yong Nyee Fan and they discussed this matter during dinner and the father agreed that it was a good proposition. She insisted that the defendant company never authorised her father to be the spokesman of the company and that the decision to purchase were the decision of the directors of the company and it was only out of respect that Yong Nyee Fan was consulted. DW1 was appointed secretary of the plaintiff company at its first meeting of directors and apparently after February 14, 1959 DW1 was no longer connected with the plaintiff company.

One aspect of her testimony which was diametrically opposed to PW2's was that she denied that the minutes of the meetings of the directors of the plaintiff company were interpreted by her to the directors although the minutes were read by her in English and the interpretation was done by one Mr. Yau Yit Ping who "knew both English and Chinese well." The credibility of this witness must be assessed according to her position during the relevant period viz-a-viz the plaintiff company and the defendant company and of paramount importance to my mind was the fact admitted by her that her shares in both the plaintiff and defendant companies were paid for by the father Yong Nyee Fan.

(4) DW2 — This witness is only relevant in respect of the counterclaim by the defendant company.

(5) DW3 — This forty-one year old businessman and director of the defendant company since 1955 is one of the surviving sons of Yong Nyee Fan. His version of what actually happened was a consistent denial of all the allegations of the plaintiff's witnesses. He maintains that the said premises belonged to the defendant company and he has never heard that it was trust property for the plaintiff company. He has been receiving rentals from the plaintiff company and there was no complaint it was not rental but interest. DW3 also admitted in his evidence that all his shares in both the plaintiff company and the defendant

company were paid for by his late father Yong Nyee Fan. In his evidence he admitted also that Yong Nyee Fan was the "moving spirit" in the defendant company although he disagreed that this was so even when the late father ceased to be a director.

- (6) DW4 — This seventy-one year old retired miner was at one time one of the directors of the plaintiff company but he withdrew in 1961. According to his testimony, during his directorship i.e. for period 1960-1961, he did not know that No. 26, Hugh Low Street, Ipoh, was held in trust by the defendant company. He knew of the Extraordinary General Meeting which was requisitioned after the notice to vacate. DW4 said he did see PW1 and PW2 in connection with the transfer of DW3's shares in the plaintiff company as he wanted to settle the matter. But according to him PW1 did not agree and therefore he did not attend the Extraordinary General Meeting because he saw there was no point in him attending. On this point his testimony read as follows:

"I did not attend the E.G.M. because I saw how Yap and Tan behaved. The E.G.M. was to discuss the notice of termination of Kim Guan tenancy. I did not attend because that shop did not belong to Kim Guan."

The credibility of this witness must be considered in the light of his own admission that he was a tributor of Yong Nyee Fan Mining Company. He also admitted that he knew the Yong family quite well and he is also a shareholder of Yong Nyee Fan Mining Company. He also admitted that he obtained shares in the plaintiff company through the allotment of Yong Nyee Fan. He also admitted that he was sponsored as director of the plaintiff company by DW3. He sold off his shares in the plaintiff company in 1962 roughly about the same time as the Yong family left the plaintiff company.

- (7) DW5 — This witness is only relevant in the matter of the solicitors' letter purportedly sent on behalf of the plaintiff company to the defendant company.

It can be seen that from the very beginning right up to the time of his death the said Yong Nyee Fan was a dominant figure in the affairs of the plaintiff company. Apparently Yong Nyee Fan was not only dominant in the affairs of the plaintiff company but also in the affairs of the family company of Yong Nyee Fan & Sons Limited (the defendant company). DW3 himself said that his father "was the moving spirit" although he disagreed it continued to be so after the father ceased to be director. Evidence adduced would indicate that Yong Nyee Fan exercised considerable influence in the management of the defendant company until he died. Why shouldn't he for from the fact (admitted) most, if not all, the shares in that company were in reality paid for by him on behalf of the close members of his family including Yong Su Hian (DW3) his son and Yong Toong Liew (DW1) his daughter.

To get a true picture of what actually happened the recorded minutes and the other documents in the Agreed Bundles A and B should therefore in my view be viewed bearing the following in mind —

- A (1) When we consider the minutes of Kim Guan directors' meetings during the material period regard must be had to the fact that DW1 (daughter of Yong Nyee Fan) was the secretary and that in her own evidence she said she drew up the minutes and then showed the draft minutes to the father first before finalising them. She also said she never interpreted the minutes to the others in the Hakka language although she admits in her own evidence that she speaks Hakka and therefore could also have interpreted the minutes to the directors herself. The said Yau Yit Ping was not called to corroborate this although it is said that this person is still around;
- B
- C (2) It is true that nowhere in the minutes of the Kim Guan directors' meetings is the question of the premises being a trust property recorded. But it would seem clear from their evidence that PW1 and PW2, the two surviving business associates, had all along followed the traditional Chinese way of doing business, i.e. dealings based on mutual trust. On going through their testimonies I do not think that I would be fair to reject outright all what they said in the witness box. PW1 said that all his dealings with Yong Nyee Fan had been based on what he described as his "faith in Yong" and that he regarded the latter "as a leader." He also described in his cross-examination the method of business dealings he followed when he said that — "Chinese business depends on trust. All dealings with Yong I did verbally." PW1 and PW2 are both past 60 years of age and I believe them when they said that being the old type Chinese businessmen they followed the traditional Chinese method of doing business and it is also common knowledge that this method is generally followed especially by the older Chinese business people. Evidence that PW1 and PW2 paid \$19,000 for vacant possession of the premises was not challenged. But strangely enough no reference can be found in any of the financial statements of the defendant company to any payment made to obtain vacant possession which payment (normally referred to as "tea-money") has always been an accepted custom and practice in the local society. It is in this light that I view the letter (76) in B where the tenant purported to surrender the said premises to the defendant company.

- D
- E
- F
- G
- H The credibility of DW3 (Yong Su Hian) can best be assessed from his own testimony. To my mind he represents the new type of businessman who believes only in what is written down. The amount paid must be rental and not interest because the receipts say they are rentals. The minutes of Kim Guan directors' meetings had already been explained to the directors including PW1 and PW2 in the Hakka language and they were accepted and approved at subsequent meetings. Therefore PW1 and PW2 cannot now be allowed to argue against these minutes. Nowhere in the minutes is any mention made of the premises in question as a trust property so that question does not arise.

I Looking at the evidence however DW3 would also seem to be a person, at least in 1957, who did

not mean what he himself put in writing. This refers to the evidence on the notice to the plaintiff company to vacate the premises within one year. Of this notice he said in his own words as follows:

"I went to the extent of terminating the tenancy to force Kim Guan to accept the transfer of my shares. I hoped a compromise would come about. I really wanted to get them out if they won't compromise."

Somewhere else he also said the notice was only to "apply pressure" to PW1 and PW2. The compromise referred to is (according to DW3) to enable him to transfer his shares in the plaintiff company.

There are other inconsistencies in the testimony of DW3. For example, referring to the letter from the solicitors of the defendant company to the plaintiff company dated May 29, 1970 he said under cross-examination:

"I wanted him out at any cost. My application to rebuild is bona fide but it is the only way to get them out."

Again in reply to the question why he withdrew the notice before real settlement was arrived at he replied:

"I withdrew the notice at the meeting before real settlement. All agreed to settle in principle."

Judging from his demeanour and his testimony as a whole I do not think that DW3 is the sort of person who would have withdrawn the notice before any real settlement was arrived at. Furthermore as to the transfer of shares proposed by DW3 (which was in any case against the by-laws of the company) it would be difficult to believe that the settlement arrived at would have resulted in the donation of one thousand dollars by DW3 (admitted by him in his evidence as reflecting the amount of legal fees involved) to the social club as a goodwill gesture. In many instances therefore in my assessment DW3 would appear to be not truly a witness of truth.

Another aspect of DW3's evidence which I find a little difficult to believe is the reason given for the Extraordinary General Meeting of the plaintiff company held on October 8, 1961, and his explanation of the word "misunderstanding" in the minutes of the Extraordinary General Meeting. He said that the Extraordinary General Meeting was called not because of his notice to vacate but because of his problem on the transfer of his shares in the plaintiff company. This in my view is contrary not only to the evidence of PW1 and PW2 and the notice of requisition of the Extraordinary General Meeting but also contrary to common sense. The time and the manner in which the Extraordinary General Meeting was requisitioned (the date of notice of termination of tenancy was September 12, 1961, and the date of notice of requisition of Extraordinary General Meeting was September 19, 1961) must have been for the purpose of discussing the notice to vacate and in the Extraordinary General Meeting the directors could not have discussed any other topic except the notice itself. DW3 himself said that the only thing discussed at the Extraordinary General Meeting was the notice. He said this in his cross-examination:

"The only thing considered at the meeting was my notice. I agreed to withdraw because we agreed to settle. This notice was only to apply pressure to them. The shares problem settled only on 23rd October. But in principle we agreed to settle at the E.G.M. It is true shares and the house two different things."

A Notice of requisition of Extraordinary General Meeting by members of the defendant company was only made on September 30, 1961 which was of course on the proposed amendments to the company's articles connected with the problem of the share transfer.

B The plaintiff company claims, firstly, for a declaration that the defendant company holds an undivided 19/56 share in the said premises in trust for the plaintiff company and secondly, for a declaration that the defendant company holds the remaining undivided 37/56 share therein in trust for the plaintiff company subject to the payment by the plaintiff company to the defendant company of a sum of \$45,000 and finally, for an order that the defendant company do transfer the whole of the said property to the plaintiff company free from all encumbrances upon payment of the said \$45,000. The application for injunction against the defendant company was abandoned at the commencement of the hearing in view of the fact that a caveat in respect of the said premises was still in force. The defendant company in their statement of defence has also made a counterclaim for damages against the plaintiff company for the delay in effecting development of the said premises as a result of the proceedings by the plaintiff company.

E It has been found difficult to give a satisfactory definition of a trust but it has been accepted that the most satisfactory definition is by Professor Keeton which definition is that a trust is the relationship which arises whenever a person called the trustee is compelled in Equity to hold property, real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

F In this case it seems obvious on going through the evidence of the various witnesses that it is really a matter of credibility. Apart from PW1, PW2 has also given evidence of the alleged trust and the fact that PW2 has no more interest in the plaintiff company from as far back as 1962 when he and members of his family withdrew from Kim Guan and that he appeared to me to be a witness of truth provides a lot of weight to the plaintiff's version of what actually took place between the three persons involved. The plaintiff's version of what actually took place seems to be the more probable. It can also be said that every one of the defence witnesses has something or some interest to protect. As regards DW1 even her shares in Kim Guan were paid for by her father. In Yong Nyee Fan Company Yong Nyee Fan was in fact in the words of DW3 the moving spirit although he denied he continued to be so after he ceased to be director. Thus the circumstances under which the defendant company acquired the property in question were such that the defendant company must have acquired the said property as a constructive trustee. H After all a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience. It arises in a situation similar to the situation of this case where a person acquired the property in such circumstances that the holder of the legal title thereof may not in good conscience retain the beneficial interest.

Apart from mere denial that there was any trust involved in respect of the property in question express or implied it is also a basis of the defence that the plaintiff company's claim is barred by limitation and/or by laches or acquiescence. Since the claim is based on an alleged implied trust and for the recovery of the trust property and that the plaintiff company is a beneficiary under the trust section 22(1) of the Limitation Ordinance, 1953 excludes the period of limitation of action prescribed by that Ordinance. No statutory period of limitation would apply to an action by a beneficiary if it can be shown that the action is under a trust and for the recovery from the trustee of trust property previously received but converted to his use. That leaves us only with the question of laches and acquiescence. Section 32 of the Limitation Ordinance, 1953 provides that nothing in that Ordinance shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

To set out the general principles first, it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, i.e. where the plaintiff has slept upon his right and acquiesced for a great length of time. For "laches" literally means negligent inactivity. He is then said to be barred by his laches. (*Halsbury's* 3rd Ed. Vol. 14, p. 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part. Of course acquiescence depends on "knowledge, capacity and freedom." It is not necessary however that the plaintiff should have known the exact relief to which he was entitled. As regards the change in the defendant's position regard must be had whether the defendant has lost the evidence necessary for meeting the claim, for a court of equity will not allow a dormant claim to be set up when the means of resisting it have perished.

In *Weld-Blundell v. Petre*⁽¹⁾ a number of previous authorities on the subject were discussed in the judgment of the Court of Appeal. In that case the plaintiffs claimed to be entitled to the equity of redemption in certain shares in a limited company for redemption, the defendants being the executors of the mortgagee. Redemption was resisted on the ground that, owing to the delay and laches of the plaintiffs, either their right to redemption had been lost or the court should withhold its assistance by refusing to order redemption. Application of the doctrine of laches was discussed in that case and one particular point which should be mentioned first as highly material in the present suit is the lapse of time between the date that the alleged trust was created and the date that the claim was made. In this case the period of lapse is about nineteen years. In dealing with the long period of delay Lord Hanworth M.R. in *Weld-Blundell v. Petre*, *supra*, at page 571 said:

"Further, I am clearly of opinion that there is no rigid rule that every equity must be acted upon at the utmost within twenty years, and if not so acted upon will be barred. Every case must obviously depend upon its own circumstances and counsel for the defendants freely admitted that he could not support any such hard-and-fast rule."

A Thus the main question left to be asked is whether anybody has been prejudiced by the delay. On this Lord Campbell L.C. said in *Archbold v. Scully*⁽²⁾:

"The real question in the case seems to me to be, whether the appellant is barred by the lapse of time between 1835 and 1857 when his bill or cause petition was filed. If any new rights had been created in this interval, or if anyone would be prejudiced by the delay, that is, by the appellant being now enabled to make good his claim, I should be clearly of opinion that he is barred by laches or acquiescence or whatever name may be given to his long sleep over his rights. But I do not discover any obstacle of this sort to the relief which he prays."

The difference between acquiescence and laches was also clearly pointed out by the House of Lords in *Archbold v. Scully*, *supra*, in which Lord Wensleydale said:

C "So far as laches is a defence I take it that where there is a statute of limitation the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact, of simply neglecting to enforce a claim for the period during which the law permits him delay, without losing his right, I conceive cannot be any equitable bar."

The principle applicable to a case where long delay is set up as a defence is also cited in the judgment of the Privy Council in *Lindsay Petroleum Co. v. Hurd*⁽³⁾:

E "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of those cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

G In *Erlanger v. New Sombrero Phosphate Co.*⁽⁴⁾ Lord Blackburn, after quoting the above passage, said:

H "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

I To sum up, there can be no hard-and-fast rule in equity. The application of the doctrine of laches or acquiescence must depend on the facts and circumstances of each case. In the ultimate analysis therefore the determination of these questions must largely depend on the court which has to decide whether the balance of justice or injustice is in favour of granting the remedy or withholding it. Equity would look primarily at the conduct of parties, sacrificing certainty and inconsistency in order to do justice according to the type of relief sought and the circumstances — see Limitation of Actions (Michael Franks page 233). The

length of the period of inactivity of the plaintiff is no doubt of material consideration but cannot and should not be the sole consideration. Of course the delay must not be unreasonable but what is reasonable is a question of fact. According to the plaintiff's witnesses attempts to settle the dispute had been made on several occasions including involving certain influential personalities of the Chinese community. These attempts were consistent with the old fashioned way in which the people of that community go about in their business. The philosophy of this class of people has always been — The court is the last resort, to be avoided if possible.

Can it be said that PW1 and PW2 had acquiesced all these years at least during the period when Yong Nyee Fan was still alive? Beneficiaries who actively or passively acquiesce in a breach of trust can, it is said, obtain no relief against the trustee if at the time of their concurrence or acquiescence they were of full age, not under any incapacity or not acting under any undue influence. It is clear from the evidence that Yong Nyee Fan was a man much respected by PW1 and PW2. He was also a sort of adviser to them. In fact Yong was one of the prime movers of the new company of Kim Guan. His dominance in the plaintiff company at its inception can even be seen in my view by the cables code of Kim Guan & Co. Ltd. which was "Yonifan" (his name was "Yong-Nyee-Fan") sanctioned to be used even in 1960. He was above all a member of the State Legislature and therefore must have been highly regarded by members of his community. In fact in the words of Yap (PW1) Yong was a "leader" and "adviser" to them. The plaintiff in this case has, in my opinion, explained satisfactorily on the delay of about nineteen years before the writ was filed. Therefore it is my view that the defence of acquiescence cannot succeed in this case.

Equity's "most valuable creation" is the trust, whereby the management of property could be separated from its enjoyment by regarding as owner in equity someone other than the person in whom the legal title is vested. Equity adopts what is called the "metaphysical" approach and has a preference for substance over form and equity pays greater attention to the intention of the parties and the method used in arriving at an arrangement — see *Keeton and Sheridan's Equity*. This general principle was expressed by Romilly M.R. in *Parkin v. Thorold*⁽⁵⁾:

"Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form and thereby defeat the substance."

On the evidence adduced both oral and documentary and in consequence upon my finding as to the credibility of the witnesses involved, the following facts would seem to have been proved on the balance of probabilities:

- (a) PW1, PW2 and the said Yong Nyee Fan had in fact agreed between them prior to the formation of the plaintiff company that the following expenditure be made on behalf of the proposed company, that is to say, the said Yong Nyee Fan to pay first for the purchase of the premises in

- A the sum of \$35,000 and PW1 and PW2 to pay to the tenant of the premises then for vacant possession in the sum of \$19,000. It was agreed between the parties concerned then that in addition to the purchase price of \$35,000 a further sum of a round figure of \$2,000 was to be added as expenditure incidental to the purchase, also to be regarded as paid on behalf of the proposed company; and these payments were in fact made;
- B
- (b) Sometime between the directors' meeting held on January 28, 1957, and the directors' meeting held on February 5, 1957, the parties concerned also mutually agreed that the sum of \$37,000 be increased to \$45,000 following the increase in the value of the property;
- C
- (c) The increase from \$45,000 to \$70,000 proposed by DW3 in 1961 was not agreed to by the other parties concerned.

I have also found that the defence on limitation and/or laches and acquiescence cannot be sustained. Because of my finding that the trust has been proved, the counterclaim is therefore without basis.

Based on all the foregoing the plaintiff's claim is allowed and the following orders made:—

- E (1) It is hereby declared that the defendant company holds an undivided 19/56 share in the land held under Certificate of Title No. 5768 for Lot No. 98S in the Township of Ipoh, in the District of Kinta, with premises No. 26, Hugh Low Street, Ipoh, erected thereon in trust for the plaintiff company;
- F (2) It is hereby also declared that the defendant company holds the remaining undivided 37/56 share in the said property in trust for the plaintiff company subject to the payment by the plaintiff company to the defendant company of \$45,000;
- (3) It is hereby ordered that the defendant company do transfer the whole of the said property to the plaintiff company free from all encumbrances upon payment of the said \$45,000;
- G (4) The defendant company's counterclaim is hereby dismissed;
- (5) Costs to the plaintiff.

FEDERAL COURT.

Lim Kean Chye (Chin Fook Yen with him) for
H the appellant.

Chinn Swee Onn (Soo Wai Sun with him) for the
respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): House No. 26 Hugh Low Street, Ipoh (house No. 26) the subject matter of this action, was bought on October 28, 1954 for \$35,000 and registered in the name of Yong Nyee Fan & Sons Sdn. Bhd. (Yong & Co.), a company incorporated in 1952. The accounts of Yong & Co. showed that the money for the purchase came from the company and the property was regarded as an asset of the company and declared as such.

Kim Guan & Co. Sdn. Bhd. however claimed that Yong Nyee Fan was the purchaser and that he had bought house No. 26 on a trust in their favour and in the action which was only commenced on April 19, 1973, some 18 years after the purchase, succeeded in obtaining an order from the High Court at Ipoh declaratory of this trust. The order was in two parts. Firstly it declared that Yong & Co. held an undivided 19/56th share in the property in trust for Kim Guan & Co. Sdn. Bhd. (Kim Guan & Co.) and secondly it declared that Yong & Co. held the remaining undivided 37/56th share similarly in trust for Kim Guan & Co. There was a consequential order that Yong & Co. transfer the house to Kim Guan & Co. on payment of \$45,000.

Yong & Co. made a counterclaim for damages for being deprived of the possession of the house. On the finding of the trial court, it necessarily stood dismissed. It formed part of their appeal but learned counsel for Yong & Co. on taking turner instructions, abandoned the appeal from the dismissal of the counterclaim. This court is therefore only concerned with the appeal from the finding and declaration of a trust.

The twin declarations of trust were made as a result of Kim Guan & Co. alleging that they had for their own part paid \$19,000 by way of tea-money to the sitting-tenant of house No. 26 at the time of the purchase by Yong & Co. in order to obtain vacant possession of the premises, and that this payment was for the house. The total cost of the house was therefore assessed at \$56,000, made up of \$35,000 for the purchase, \$1,444.40 for legal fees and other disbursements involved in the transfer, rounded off to \$2,000 (one would have thought, rather generously, for the hard-headed businessmen that the claimants were) and \$19,000 for obtaining vacant possession. The property was then divided into 56 undivided shares. It was not a matter of serious dispute that Kim Guan & Co. did pay this \$19,000 to the tenant in occupation otherwise they would not have been able to obtain vacant possession of the premises which were protected under the then Control of Rent Ordinance, 1948. This payment was clearly not made out towards the land but it was put forward as Kim Guan & Co.'s contribution to the total cost and accepted by the learned judge as such.

The claim of a trust in favour of Kim Guan & Co. was founded on an alleged agreement, which as set out in paragraph 6 of the statement of claim was as follows:

"6. Under the said arrangement, the said Yong Nyee Fan agreed that he would advance for the purchase of the premises No. 26, Hugh Low Street, Ipoh, and that the said Tan Peng Nam and Yap Fook Seng would advance the money for compensation to Chop Toong Sang Woh (the sitting tenant) for giving up vacant possession of the said premises and that the said premises when so acquired for such use were to be held in trust for the New Company."

The new company referred to was Kim Guan & Co. which at that time was not formed. It was incorporated only on February 12, 1955.

Paragraph 11 of the statement of claim (as amended) reads:

"11. The said premises were to be transferred to the plaintiff company on the plaintiff company reimbursing the said Yong

Nyee Fan in the sum of \$37,000 (Dollars thirty seven thousand) for what was paid for the said house but when it was ascertained that the said Yong Nyee Fan had purchased the said premises in the name of the defendant company, the said Tan Peng Nam wanted to have the New Company wound up but a settlement was effected by the plaintiff company agreeing to pay \$37,000 (Dollars thirty seven thousand) to the defendant company in respect of the trust aforesaid being the demand made by the said Yong Nyee Fan. The said amount was in 1957 increased to and agreed at \$45,000."

To establish this alleged trust Yap Fook Seng, PW1 (Yap), one of the founder-directors of Kim Guan & Co., gave evidence of the arrangement referred to in paragraph 6 of the statement of claim. He further testified that when Yong Nyee Fan in February 1955 presented him and his associate Tan Peng Nam (Tan) with a demand for 3 months rent for November 1954 when Kim Guan & Co. moved into occupation to January 1955, he and Tan then and only then found out that house No. 26 had been purchased in the name of Yong & Co. and they then decided to withdraw from Kim Guan & Co. But according to him, a compromise (the 1955 settlement) was reached on the following terms:

- "1. To transfer the premises to the company at \$37,000. The \$37,000 made up of \$35,000 for purchase price and \$2,000 for incidental fees.
2. Yong said he had advanced \$37,000 and wanted interest at \$220 on that amount as it was chargeable as a bank rate — which worked out at 6%. Temporarily the \$220 interest was to be treated as rent. It was only a temporary measure.
3. The company was to pay assessment and quit rent because all agreed premises was to be transferred to the company."

It was common to both sides that Kim Guan & Co. throughout paid the assessment on the premises, but it was not uncommon for tenants to pay assessments and the fact of this payment by Kim Guan & Co. was not conclusive one way or the other of the status of Kim Guan & Co.

The monthly payment of \$220 was by demand in writing made by Yong Nyee Fan with a threat to terminate the tenancy unless agreed to, increased to \$300 as from September 1, 1954. Kim Guan & Co. denied however that this was an increase in the rent for the premises and claimed that this increase was the result of the rise in the bank rate from 6% to 8%.

Kim Guan & Co. also averred that they made another attempt in 1956 at having the house transferred to them.

In 1957, another crisis arose. Yong Nyee Fan threatened to resign as a director of Kim Guan & Co. In the settlement reached (the 1957 settlement), he made an offer to sell the house to the company for \$45,000, which offer the company accepted. They proposed to raise a loan of \$30,000 from a bank to effect the purchase. The offer and acceptance were recorded in the minutes of Kim Guan & Co. on March 11, 1957 in these words:—

"Purchase of 26, Hugh Low Street, Ipoh for \$45,000.

Messrs. Yong Nyee Fan & Sons Limited, the owner of this premises decided to sell this premises for the sum of \$45,000. The directors realized that it will be advantages (sic) to the company if the company buys over this shop. After much discussion it was unanimously agreed to buy 26, Hugh Low Street, Ipoh for the sum of \$45,000.

Grant of 26, Hugh Low Street, Ipoh.

The directors gave power to the Managing Director to hand over the grant of the above premises to the Chung Khiaw Bank, Limited, Ipoh as surety for the loan of \$30,000. Should the sum of \$30,000 be insufficient to make up for the purchase price of this premises, Mr. Tan Phang Nam and Mr. Yap Fook Seng would be empowered to get a further loan of \$15,000 from the Chung Khiaw Bank, Limited, Ipoh."

This incidentally was the first mention in the minutes of Kim Guan & Co. of any interest in house No. 26 and Yong & Sons sought to place great emphasis on it in resisting the claim of a trust.

But it would appear that the offer was only tentative as on July 28, 1957 the Board of Kim Guan & Co. recorded that

"(a) *Purchase of 26, Hugh Low Street, Ipoh.*

The Directors decided to have the transfer of this property put through when Messrs. Yong Nyee Fan & Sons Limited decided to do so."

In the event no such purchase was effected.

Yong Nyee Fan died in 1960.

So at the trial it became, as Yap admitted under cross-examination, a matter between the word of two living persons and a dead man who could not now speak for himself. But there is no rule of law that a claim against a dead person cannot be entertained or that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim by a living person against the estate of a deceased person. As Sir James Hannen said in *In re Hodgson*⁽⁶⁾ at p. 183:

"Now, it is said on behalf of the defendants that this evidence is not to be accepted by the court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon."

Lord Denning M.R. and Phillimore L.J. in *In re Cummings dec'd.*⁽⁷⁾ agreed, the former citing the above-quoted passage.

A slightly earlier case is *In re Garnett*⁽⁸⁾ where Brett M.R. said at pp. 8-9:

"Another point was taken. It was said that this release cannot be questioned because the person to whom it was given is dead, and also that it cannot be questioned unless those who object and state certain facts are corroborated, and it is said that was a doctrine of the Court of Chancery. I do not assent to this argument; there is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the judge, in fact, believes to be absolutely true, is, according to a doctrine of the Courts of Equity, not to be believed by the judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. There is no such law. The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be, first of all, in a state

A of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or in Equity."

Plowman J. in *Thomas v. Times Book Co. Ltd.*⁽⁹⁾ at pp. 915-6 adopted this dictum of Brett M.R.

B These authorities establish that though the case for the claimants of a trust against a dead man needs no corroboration, it must be approached with suspicion.

It is convenient at this stage to examine the incorporation of Kim Guan & Co. The authorised capital was \$500,000, but at the incorporation, the subscribed capital was \$299,000, made up of 2990 shares of \$100 each. The number of shares allotted for consideration other than cash was 1782 and these shares went equally to Yap and Tan in consideration of Kim Guan & Co. taking over the assets of the partnership business hitherto carried out at No. 65, Hugh Low Street, Ipoh, at a valuation of \$178,200. Yap and Tan paid in cash \$21,800 for the remaining 218 from the 2000 shares allotted to them while Yong Nyee Fan paid \$99,000 fully for his 990 shares. Yong Nyee Fan became at all relevant times a director of Kim Guan & Co.

The claim of a trust was based on the oral evidence entirely of Yap and Tan, the two partners in the business of Kim Guan which was commenced in 1949, and the two founder-directors of Kim Guan & Co. In their evidence, when it came to expanding their partnership business, they thought of acquiring new premises and forming a limited company. House No. 26 was found suitable and they and Yong Nyee Fan agreed to purchase it. Yong Nyee Fan was to purchase it for \$35,000 while they were to pay to the tenant a sum which was eventually reduced to \$19,000 for vacant possession. The purchase of house No. 26 in October 1954 was for the business and they were unpleasantly surprised when in February 1955, Yong Nyee Fan demanded rents for the 3 previous months. Their confrontation of Yong Nyee Fan led to the 1955 settlement.

G Yap and Tan, however, agreed that in the minutes of their Board meetings, no mention whatsoever was made of the purchase of house No. 26 for the company and that the first indication of any interest they might have in the premises other than as tenants was the tentative offer to sell the premises to them in the 1957 settlement. In the meantime they had paid monthly sums by way of rents and in certain months, the tender of rents was made by Yap by letter written in Chinese, a language which he could not deny he understood. His explanation however was that the payments were meant as interest-payments. When he said rents, he meant interest.

I When asked to explain the absence in the minutes of their Board meetings of any mention of trust right from the inception of the company, Yap ventured no explanation but Tan, who at the trial was no longer connected with the company and who, as he stressed, had no more interest, least of all his own, to serve, charged the secretary Madam Yong Toong Liew with falsifying the minutes or misinterpreting them, and

another director Yau Yit Ping who acted as interpreter in the Board meeting leading to the 1957 settlement with falsely interpreting what was recorded in the minutes. This is by its nature a serious charge. If it was not an afterthought advanced only at the trial, the case of Kim Guan & Co. against Yong Nyee Fan was one of fraud and the pleadings of Kim Guan & Co. should have been such as to let the defendants know the true case they had to meet. When it is realised that Madam Yong Toong Liew is the daughter of Yong Nyee Fan, the charge must be seen to be a charge of conspiracy to defraud Kim Guan & Co. Yet when she gave evidence for the defence, she was not charged with conspiracy or with falsifying the minutes during her cross-examination and that is a matter of some relevance. Now, Yau Yit Ping was not called by either side. The learned judge held the failure to do so against the defendants but with respect, it was Kim Guan & Co. which alleged that the minutes were wrongly interpreted and therefore the onus was on them to call Yau Yit Ping if they were to avoid having the adverse presumption under section 114(g) Evidence Act, 1950 drawn against them.

However, on further reflection, it must be seen that there is absolutely no substance in the charge of falsifying the minutes or misinterpreting them. Apart from the first mention of house No. 26 in the minutes of March 11, 1957 which was the offer to sell Kim Guan & Co. the house for \$45,000 and which Yap and Tan knew all about so that there was in this instance a correct record and a faithful oral translation, the charge was really one of omission and not infidelity, since at all Board meetings previous to this, the matter was never brought up and discussed. And from the evidence of Yap himself who said that in the manner and custom of Chinese businessmen (of which there was no evidence), they trusted one another, they did not require any records and they did not discuss the matter of the premises at the Board meetings, it does appear that the charge of falsely recording and translating the minutes was itself false.

It goes without saying that the claim of a trust against Yong Nyee Fan could only succeed on evidence of what he said or did in his lifetime in relation to this house and Kim Guan & Co., from which a trust could be inferred. This meant relevant evidence before his death in 1960. Evidence contemporaneous with the transaction, or shortly before and shortly afterwards, must be seen to be much more important than the evidence of events after the death of the person who was alleged to have constituted himself the trustee.

All the documentary evidence from the absence of any mention in Kim Guan & Co. and from the positive assertions in Yong & Co. was against a trust. The only evidence for it was the oral testimony of Yap and Tan and this evidence has, on the authorities above quoted, to be treated with suspicion and to be set against all the other evidence.

For ourselves, we have not been able to understand why if the money for the purchase of the house and for the expenses incurred in the purchase had to be advanced by Yong Nyee Fan, 370 of the shares he took in Kim Guan & Co. representing a cash value

A of \$37,000 could not have been issued as other than by payment in cash or, if his \$99,000 cash contribution was needed for operating capital, a further allocation of 370 shares as fully paid up could or should not have been made out to him. And, by the same token, if the \$19,000 tea-money paid by Yap and Tan to the sitting tenant was to be treated as payment to and for the house, why could not Yap and Tan pay this sum less and get 190 shares as fully paid up or be issued with another 190 additional shares?

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Inssofar as the payment of the so-called interest was concerned, evidence was led that the actual rent paid by the previous tenant was \$180 p.m. to induce the court to believe that the \$220 paid per month was for interest, but this oral evidence was completely refuted by the receipt held by the previous tenant. And, as interest, the arithmetic of Kim Guan & Co. was all wrong and their counsel at the appeal before us was unable to assist us in understanding how the various sums were arrived at. Interest payments have customarily been calculated at a percentage of the principal owing and as a matter of fact, Kim Guan & Co. solemnly averred that the first rate was 6%. They suggested that at 6% on \$37,000, the interest payment came to \$220 rounded off from \$222 per month and that was the actual sum paid. But 6% per month would mean a preposterous 72% p.a. and on \$37,000 a sum of \$26,640 in interest for 12 months. However, it was clear, as counsel for Yong & Co. pointed out, the rate of interest claimed was described as the prevailing bank rate and that would mean 6% p.a. If so, it would make for greater confusion, as 6% p.a. on \$37,000 would mean a monthly payment of \$185 and on \$35,000 a monthly figure of \$175. Neither figure tallied with or even approached the \$220 actually paid. The sum of \$220 paid by Kim Guan & Co. tallied however with the rent paid by the previous tenant.

When it came to the payment of \$300 per month, counsel for Kim Guan & Co. thought he was on surer ground as the increase was said to be the result of an increase in the bank rate from 6% to 8% (of which, there was, incidentally, no proof adduced) and in his calculation as he suggested to us, 8% p.a. of \$45,000 came to an exact \$300 p.m. If 8% was the yearly rate and \$45,000 the sum owing, he was arithmetically right. But his facts were, with respect, all wrong. The increase to \$300 was demanded in August 1956 and paid as from September 1, 1956. The offer to sell the house for \$45,000 was made rather later, in the 1957 settlement, so that the alleged increased bank rate of interest was made to bear not on \$45,000 but on \$37,000 and that worked out at only \$246.67 p.m. In any event, a lender has been known to increase the rate of interest charged but where interest has been regularly paid, this court is unable to understand how he may increase the capital sum owing, but this was what Kim Guan & Co. accused Yong Nyee Fan of doing.

The conclusion is inevitable that the sums paid are not reconcilable with any bank rate of interest on the capital expended in the purchase of the house, as contended by Kim Guan & Co.

It is also to be noted that in the course of his oral evidence in court, Yap quite often, perhaps unconsciously, slipped back to calling the monthly tenders of money as rents or rentals, and he admitted that in the accounts of Kim Guan & Co. as well as in their income tax returns, the payments were treated as rents.

The learned trial judge observed that the oral evidence of Yap and Tan was "diametrically opposite" to their own documentary evidence. But it was not merely that. It was wholly inconsistent in itself. Now this evidence he was enjoined by authority to treat with caution and suspicion, but his actual approach was to see how far the oral evidence altered the documentary evidence. It was stated in these words: —

"In normal cases it would have been easier to go through these documents either as basis or corroboration as to which of the versions of what actually happened during the material period is the more probable one. But apparently it is not the case here and I say this for the following reasons. One thing is clear so far and that is this — what is contained in some of the documentary evidence is not quite the same as what is said by the witnesses. Because their versions are diametrically opposed there is then the question of how to get a clear picture of what actually happened. On going through the oral evidence and the documentary evidence in this case there is therefore in my view a need (for other reasons as well which will be shown later) to reconcile their oral evidence with the documentary evidence."

His reasons were that Yap and Tan did not understand English. The minutes were all written in English, mostly by Yong Nyee Fan's daughter and they might have been falsified. Therefore

"From all these one thing emerges and that is, one will not get a clear and true picture of what actually happened unless a finding is made first on the credibility of each of the witnesses concerned."

With great respect, this is not the right approach in the somewhat special circumstances of this case.

It has been said time and time again that an appellate court should not lightly differ from the trial judge's findings of fact or his rating of credibility of the witnesses whom he had the distinct advantages of seeing and hearing in the witness box. If it is a matter of credibility, then this court would long hesitate before it purported to overrule the findings of the trial judge and even then it would be skating on thin ice. But perhaps fortunately for the appellants, it is not a matter of credibility but it is a matter of inferences to be drawn from the evidence. And in such a matter, an appellate court is in as good a position as the trial court.

In the case in hand, no amount of rationalisation or explanation can, it seems to us, convert the declared tender of rents into payment of interest. There can be no doubt as to the correct answer to the question whether the coat should be cut to fit the body or the body be chopped to fit the coat, but throughout, the case for Kim Guan & Co. gives the distinct impression that the surgical operation is to be preferred to the sartorial. And if we may say so without disrespect, counsel for Kim Guan & Co. floundered hopelessly in trying to explain how the interest was calculated. Refuge behind the screen of faith in the integrity of Yong Nyee Fan which Yap and Tan advanced as the reason why the contemporary written records were so

- A strangely and so completely silent on any matter of trust or even interest in the house and which prevailed so persuasively with the judge, must, even on the ordinary judicial assessment of evidence, fail to establish a trust where none was anywhere else shown to exist. If the more stringent test of caution and suspicion which authority enjoined the court to apply was applied and he had directed his mind to the probabilities and the arithmetics of the case, it is a matter of some uncertainty that the learned judge would have come to the same decision. Where, as here, the contemporary records were not shown to be other than correctly written up in the ordinary course of business, they must be preferred to the oral evidence of witnesses with an interest of their own to serve,
- B more particularly so where the oral testimony was in itself so clearly inconsistent and unreasonable.
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As Bowen L.J. said in *Re Postlethwaite*⁽¹⁰⁾ at p. 520:

- "... if the correspondence and facts are capable of a reasonable explanation consistent with the validity of the transaction, one ought not to draw in the dark inferences which would really be guesses. So long as a reasonable explanation is possible we ought not to draw inferences in favour of the invalidity of the transaction. The general presumption which the law makes is in favour of the good faith and validity of transaction, and not against them, and that presumption ought to acquire, and does acquire, weight from the length of time during which a transaction has subsisted. Having regard to the date of the transaction and the death of the parties, I think we should be acting on guesses, and not upon legal grounds, if we were to displace this transaction now."
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- If the legal gloss which was put over the purchase of the house is removed, then the contention of Kim Guan & Co. must be seen to be nothing more or less than an alleged agreement with Yong Nyee Fan that the latter was to buy the house and later sell it to Kim Guan & Co. That promise, if founded on fact and if given for good consideration, could possibly give rise to a claim in contract subject, of course, at this stage to any defence on limitation, but it did not constitute the promisor a resulting trustee. It did not fit in with the classical case of a purchase being taken in the name of a stranger, which would constitute the nominal purchaser a resulting trustee for the one who provided the purchase money. Nor did this alleged promise to sell constitute Yong Nyee Fan a constructive trustee, since it did not establish that the property was acquired through the medium of a trust. It is settled law that the court will not impute a legal relationship on the strength of what one party thought of the matter, where there was no intention whatsoever to create such a relationship.
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- If there was any claim at all in 1954, it was a claim in contract against Yong Nyee Fan or against his estate but it could not be against Yong & Co. the registered proprietor of the land. At the time of the alleged promise, Yong Nyee Fan was neither a director nor a shareholder of Yong & Co. and any promise he made would be in his personal capacity. He might well be the dominant character in his family, but that did not alter the situation in regard to the actual relationship between the parties.
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We now turn to the evidence of events occurring after the death of Yong Nyee Fan which was led by both sides and considered by the learned judge. It

was common to both sides that a son of Yong Nyee Fan, one Yong Su Hian by name, took his place on the Board of Kim Guan & Co. after his death and that shortly afterwards, Yong Su Hian issued a notice to Kim Guan & Co. to quit the premises.

On receipt of this notice, Yap said he instructed his then solicitors, Das & Co., to write to Yong & Co. claiming that the property was trust property. The office copy of this letter which would ordinarily be retained by the solicitors is now untraceable as Das & Co. was closed shortly afterwards by the unfortunate death of one of the partners of the firm, but Yong & Co. adduced evidence, for what it was worth, that their solicitors did not receive any such letter.

But on receiving representations from Yap and possibly Tan as well, Yong Su Hian retracted the notice to quit, and instead demanded an increase of rent to \$700 p.m. The increase in rent was not paid, and no action taken to enforce it, probably because it was illegal, but at the same time Yap admitted that neither did he take any action, even at that stage, to enforce the alleged trust. It was, according to him, not in the nature of the Chinese to resort to action.

However something came out of all this. The relationship between the parties had by then become strained and it was thought that the time had come for the parting of the ways. On October 23, 1961 a settlement (the 1961 settlement) was reached whereby Yong Su Hian and members of his family transferred their shares in Kim Guan & Co. to Yap and Tan and in turn Yap and Tan and members of their families transferred their shares in the Yong Nyee Fan Mining Co. Ltd. to Yong Su Hian and his relations. There was also a cash adjustment arising from the valuation of the respective shares. Yap and Tan paid Yong Su Hian \$22,000 as well as his legal fees. Yap and Tan said however that the 1961 settlement contained an acknowledgment of their right (of which there was no written evidence) to house No. 26, but Yong Su Hian said that the settlement did not extend beyond the exchange of shares.

Despite what Yap and Tan contended, Yong Su Hian in 1967 asked for fair rent and at a Board meeting, offered to transfer the house to Kim Guan & Co. for \$70,000. No record exists of the reactions of Yap and Tan to this offer.

Then on May 29, 1970, Yong Su Hian served on Kim Guan & Co. a year's notice to quit, preparatory to an application to the Rent Tribunal for re-possession of the premises for rebuilding and in 1973 Yong Su Hian applied for re-possession. This was the traditional last straw. Kim Guan & Co. consulted solicitors and their solicitors on April 10, 1973 formulated a claim based on the alleged trust. And it is to be remarked that in all the voluminous documents possessed by the respondents, this was the very first in which a claim of this nature was made. Three days later, apparently without waiting for a reply, Kim Guan & Co. took the action which hitherto Yap had, as he said, been so loath to take, as being not in his character.

This action so long-delayed laid Kim Guan & Co. wide open to a charge of laches which the appel-

lants dutifully made both at the court of first instance and before us.

Now it is abundantly clear that all this evidence post-mortem Yong Nyee Fan which the learned judge considered is of no probative value whatsoever in deciding the central issue whether or not Yong Nyee Fan was the trustee of house No. 26 for Kim Guan & Co. Ltd. It was not in any way evidence of what Yong Nyee Fan did or acknowledged. If of any value at all, it was evidence of consistency in the view of the family of Yong Nyee Fan that house No. 26 was let to Kim Guan & Co. The learned judge however apparently considered Yong Su Hian as not a witness of truth and his evidence as inconsistent. But it is obvious that Kim Guan & Co. stood to succeed or fall by their own evidence and by such evidence by way of admissions or otherwise from the other side that they could get and they could not succeed merely on the defect of Yong Su Hian as a witness or on his default and that of his other witnesses.

Reading the judgment of the learned judge as a whole, we see that he really could not and did not find any evidence pointing to Yong Nyee Fan constituting himself the trustee of house No. 26 for Kim Guan & Co. He dealt with the case on this basis and perhaps it is just as well if we do so, too. It relieves us of the necessity to consider the implications of the registration of the title in the name of Yong & Co. and the indefeasibility of title that is the key-stone of the Torrens system of registration. We too can find no such evidence on the record. We have already indicated that we do not, with respect, consider the approach adopted by the learned judge and his acceptance of the faith alleged to have been placed by Yap and Tan in Yong Nyee Fan sound. In the absence of evidence, the alleged trust could not be said to have been proved, even on a balance of probabilities. The appeal must be allowed with costs here and in the court below. The claim of Kim Guan & Co. stands dismissed.

Appeal dismissed.

Solicitors: *Kean Chye & Sivalingam; Chinn Swee Onn & Co.*

KEPONG WOOD PRODUCTS CO. SDN. BHD. v. DAISHOWA (M) WOOD PRODUCTS SDN. BHD.

[O.C.J. (Abdul Hamid J.) June 22, 1977]

[Kuala Lumpur — Civil Suit No. 1633 of 1975]

Contract — Breach — Damages — Whether terms of agreement had been so altered, varied and waived by mutual consent and conduct of parties that defendant not liable under agreement — Partial rescission — Effect of — Damages — Principles of assessment.

The plaintiff in this case claimed against the defendant damages for breach of contract to purchase wood chips. By an agreement of January 17, 1974 entered between the plaintiff and the defendant, for five years from the date of the said agreement, the defendant agreed to purchase from the plaintiff all wood chips produced by the plaintiff on terms set out in the agreement with an option to renew for a further period of five years on the same terms and conditions by giving two months' notice to the other party. The plaintiff claimed that the price of wood chips was \$18 per long ton (LT) of 2,240 lbs and it was increased by mutual agreement. The plaintiff